CF0000057439

(2)

Single Bench (Criminal)

IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR.

CR. APPEAL NO. 1162 OF '89.

APPELLANTS. (IN JAIL)

1. Satyendra Kumar son of Lal Mahendrakumar Pulsatya, aged 24 years, resident of Thakurtola, Gandai, District Rajnandgaon, M.P.
2. Dhanuk son of Sahdeo Dhobi, aged 30 years, resident of Thakurtola Gandai, Police Station Gandai, District Rajnandgaon, M.P.

V E R S U S :

RESPONDENT. State of Madhya Pradesh ~~Rai~~ through Police Station Gandai, District Rajnandgaon, M.P.

CRIMINAL APPEAL UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE.

CONVICTION. SENTENCE.

(29)

AFR

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उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक Cr.A.No.1162/1989 **सन् 200**

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

22.2.2007

Shri F.S.Khare, counsel for the appellants.

Shri Arun Sao, Govt. Advocate, for the State.

Arguments heard.

Judgment passed as follows:

ORAL JUDGMENT

(22.2.2007)

Sunil Kumar Sinha, J.

(1) This appeal is directed against the judgment of conviction and order of sentence dated 6th of December, 1989 passed by the Addl. Sessions Judge, Khairagarh, Distt. Rajnandgaon, in Sessions Trial No.24/1989 whereby the appellants have been convicted u/s 457, 394 & 450 IPC and sentenced to undergo rigorous imprisonment for 3 years, 5 years and 5 years respectively. The sentences have been directed to run concurrently.

(2) The facts of the case are that on 08.9.1988 P.W.1 Dulichand and his wife Kamala (P.W.2) alongwith their daughter, namely Ku.Sushma, were sleeping in their house. Dulichand was a shop keeper, who was having one small shop in a portion of the said house. In the mid night, they heard some noise, on which they woke up. There was no light in the village, therefore, P.W.1 switched on his Torch and saw that two

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -2-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

persons were trying to take away the cash box of his shop. One of the said persons had covered his face with some cloth (Lungi). When they saw that the complainant (P.W.1) has woken up, the person who had covered his face, assaulted him with the help of iron chain (*Sakal* which is used in the village for closing the doors). P.W.1 received injuries on head, left arm & face and blood started oozing from his nostrils. During scuffle, P.W.1 Dulichand removed the veil of the assailant and he could identify that the assailant was accused Satyanedra Kumar. Seeing all this, the other assailant also tried to assault the complainant, on which the complainant started raising hue and cry and the intruders ran away from the place of occurrence leaving the cash box there in the house of complainant. At the time of *Marpit*, the complainant had tried to defend himself with the help of Torch, due to which, the glass portion of the Torch was broken and various articles contained in the cash box also fell down from the hands of accused and those things were scattered on the floor. On hearing hue and cry, Pila Ram, Aktu Ram, Sada Ram, Vipat and Nanku etc., reached to the house of complainant Dulichand, to whom, he narrated the story by telling the names of both the assailants i.e., accused appellants no.1 & 2. The report of the incident was taken on *Dehati Nalishi Ex.P.1* on 09.9.1988, which was recorded by P.W.7

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -3-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Devkinandan Sharma. This *Dehati Nalishi Ex.P.1* also contains the names of assailants and it also contains the description of articles (properties) which were involved in commission of the aforesaid crime. On the basis of this report, the Investigating Officer prepared site plan under Ex.P-9. The injured complainant Dulichand was sent for medical examination under Ex.P-5. He was examined by Dr. Sudhakar Damle (P.W.6) who gave his report under Ex.P-6. Since the victim was complaining about injuries in nostrils, he was sent for further examination to ENT specialist under Ex.P.3 and was examined by Dr.S.K. Agrawal (P.W.5) who gave his report dated 16.9.1988 (Ex.P.4).

(3) A perusal of M.L.C. report, *Ex.P.6*, would show that the complainant has received abrasion in size of 5cm x 1/4cm on the upper portion of left arm. One bruise was present in size of 4cm x 2cm on the left shoulder. It was reddish in colour. An abrasion was found on the left side of the head which was in size of 1/2cm x 1/2cm and he was complaining pain in the nose. Dr.Sudhakar Damle (P.W.6) opined that all the injuries were simple in nature and except injury No.4, all the injuries were caused by hard and blunt object. He has advised for further examination of injury no.4 by an ENT Specialist. It is for this reason, the victim was again referred to ENT Specialist on 16.9.1988 and a report

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आदेश पत्रक (पूर्वानुबद्ध)

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was obtained under Ex.P.4. The property in question was also seized by the Investigating Officer under Ex.P.2. These are the various articles which were seized from the place of occurrence itself i.e., Cash Box made of Aluminum , currency notes, broken piece of wooden chair, one used Eveready Torch, one Lungi, one small *Chitkani* (used for bolting the doors), an iron chain and one small Axe. After completion of investigation, charge sheet was filed in the Court of J.M.F.C., Khairagarh, who in turn committed the case to the Court of Sessions, Rajnandgaon from ;where the learned Addl. Sessions Judge, received the file on transfer and conducted the trial.

(4) The prosecution in order to establish the guilt of the appellants, examined as many as 8 witnesses. Thereafter, the accused persons were examined u/s 313 Cr.P.C., in which they denied the material appearing against them in the prosecution evidence and proposed for examination of a defence witness, in consequence of which, defence witness Jairam Singh (D.W.1) was examined.

(5) After completion of the trial the learned Sessions Judge, convicted the accused appellants u/ss 457, 394 & 450 of IPC and sentenced them to undergo rigorous imprisonment as aforementioned.

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आदेश पत्रक (पूर्वानुबद्ध)

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(6) Learned counsel for the appellants argues that the version of P.W.1 & P.W.2 regarding identification of the appellants are not reliable as they have given a totally unnatural version and the conviction based upon their testimonies is not sustainable. He also argues that when the accused appellants were convicted u/s 457 IPC by holding them guilty of committing lurking house trespass or house breaking by night, in order to commit the offence punishable with imprisonment, they could not have been further convicted u/s 450 IPC because none of the ingredients of the offence u/s 450 are made out in this case.

(7) On the other hand, learned State Counsel supports the judgment of conviction and order of sentence passed by the trial Court.

(8) I have heard learned counsel for the parties at length and have also perused the records of the sessions trial.

(9) In order to appreciate the first point of identification, evidence of P.W.1 Dulichand is required to be scrutinized. P.W.1 Dulichand has stated that the accused persons were previously known to him. On the fateful night, they were sleeping in their house. At about 11.45 in the night, his wife Kamla Bai (P.W.2) heard some noise. She told it to him and when he switched on his torch, in the torch focus, he saw that there were two persons out of whom one had covered his face with Lungi.

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -6-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

When those persons were seen by him, they rushed to assault him and the person who had covered his face with Lungi (appellant no.1 Satyendra Kumar), assaulted him with the help of an iron chain (*Sakal*) by which he received injuries on hand, head and nose. He stated that the other person Dhanuk Ram also assaulted him with the help of broken piece of wooden chair. He has further stated in Para 2 that when he chased the first man, he got his face uncovered as the *Lungi* was taken off by this witness and at that time also, in the Torch light focus, this witness identified that the said person was accused appellant Satyendra Kumar and the other person was Dhanuk. He also stated that accused Dhanuk was taking away the cash box which fell down on the way and the amount contained in the cash box, alongwith various other articles, scattered on the floor. He has further stated vide para 3 that he made hue and cry, on which, Sadaram, Vipat, Akturam, Pilaram and Nanku etc., came to his house and saw him in injured condition. He has specifically stated that at the same time i.e., in the night itself he had disclosed the names of assailants i.e., accused appellants Satyendra and Dhanuk as the persons who had tried to commit robbery in his shop and had assaulted him during the course of such act. He has also stated that a report under Ex.P.1 was given to the S.H.O. in Police Station, on

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आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -7-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

which, the investigation has commenced and various articles etc., were seized by the Police. He was sent for medical examination on which the Doctor has examined him.

(10) P.W.2 Kamla Bai has corroborated the version of P.W.1. She has stated that both the accused persons are well known to her. On the fateful night, she and her husband both woke up after hearing the noise and in the torch light they saw that the accused persons have entered into their house and they had broke open the doors of their shop. She has stated that the accused appellant Satyendra had covered his face with *Lungi* and he was assisted by accused appellant Dhanuk. She has also stated that Satyendra has assaulted her husband on which he has received injuries. She has further stated that Dhanuk was trying to take away the cash box from the shop which fell down and the amount etc., contained in the box were scattered on the floor of shop. She has also stated that during the course of scuffle, when her husband was trying to catch Satyendra, the Lungi by which he has covered his face came in the hands of her husband and his face was unveiled and they could see that he was Satyendra and he was identified by them. She has specifically stated that they had identified both the accused persons.

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -8-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

(11) Akturam has been examined as P.W.3. He has stated that on hearing hue and cry, he rushed to the house of complainant on the fateful night at about 12 p.m. and saw the complainant in injured condition. He has specifically stated that complainant Dulichand (P.W.1) had told him that these accused persons namely Satyendra and Dhanuk had tried to commit robbery in his shop and they have assaulted him. He has further stated that he has seen various articles including currency notes etc., in the house of complainant, which were scattered on the floor. Similar is the statement of Sadaram who also stated that when he reached the house of the complainant after hearing his hue and cry, he saw various articles lying on the floor and at that time, complainant Dulichand P.W.1 had disclosed the names of the assailants to him also.

(12) Though lengthy cross examination has been done by the defence, but the defence has not been able to bring out any such fact on record which may suggest that these two witnesses, P.W.1 Dulichand and his wife P.W.2 Kamla Bai could not identify the assailants or they are falsely implicating them in this case. The conduct of these witnesses are quite natural and their versions are supported by the evidence of P.W.3 and P.W.4 who are the villagers of the same village and have stated that when the hue and cry were made they had reached to the house of the

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आदेश पत्रक (पूर्वानुबद्ध)

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complainant in the night itself and the complainant had disclosed to them that these two accused persons had entered into their house and tried to commit robbery of the cash box and various other articles in the house and they have also injured him with the help of above articles. In light of the evidence of P.W.1 and P.W.2 (complainant and his wife) which is duly corroborated by evidence P.W.3 and P.W.4, it cannot be said that the identification or presence of these two accused persons has not been established by the prosecution and the story set forth by these two witnesses is false or unbelievable. This story has been admittedly supported by P.W.3 and P.W.4 and nothing unnatural is coming out from the story. The version of these two witnesses is further supported by seizure of various articles and also by the medical examination of P.W.1 in which the injuries sustained by P.W.1 were noticed by Doctor who examined him on 09.09.1988. Therefore, there is no force in the first argument raised by learned counsel for the appellants that the appellants were not duly identified to be the assailants or the persons entering into the house of the complainant for committing robbery, and the same cannot be accepted.

(13) Now we come to the second point about conviction under sections 457 & 450 IPC. Section 450 IPC provides punishment for house tress-

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -10-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

pass in order to commit offence punishable with imprisonment for life. It provides that whoever commits house trespass in order to the committing of any offence punishable with imprisonment for life, shall be punished with imprisonment of either description for a term not exceeding 10 years and shall also be liable to fine. Section 457 provides punishment for lurking house-trespass or house-breaking by night in order to commit offence punishable with imprisonment. It provides that whoever commits lurking house-trespass by night or house-breaking by night, in order to the committing of any offence punishable with imprisonment, shall be punished with imprisonment of either description for a term which may extend to 5 years, and shall also be liable to fine; and if the offence intended to be committed is theft, the term of imprisonment may be extended to 14 years.

(14) House-trespass, lurking house-trespass and lurking house-trespass by night are defined under Sections 442, 443 and 444 IPC which reads as under:

> 442. **House trespass** – whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place for worship, or as a place for the custody of property, is said to commit "house-trespass".

P.T.O.

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -11-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

443. **Lurking house-trespass.**—Whoever commits house trespass having taken precautions to conceal such house-trespass from some person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass, is said to commit "lurking house-trespass".

444. **Lurking house-trespass by night.**—Whoever commits lurking house trespass after sunset and before sunrise, is said to commit "lurking house- trespass by night".

(15) By the above definitions, it is clear that if the house trespass is committed by taking precautions to conceal such trespass from some person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of the trespass, then it shall be termed as lurking house-trespass. It has further been defined that if such trespass is made after sunset and before sunrise it shall be termed as lurking house- trespass by night. Therefore, the difference between the house trespass and lurking house-trespass by night is writ large which is, that in the former, there is no element of concealment or precaution to conceal or to conceal such act of trespass from the person who is having a right to exclude or eject the trespasser from the subject matter of the trespass which may be a building, or other place as defined in the said sections, but in the latter, the element of concealment is a vital

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश - 12 -	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

factor. Another important factor is that in former the house-trespass must have been committed in order to commit an offence punishable with imprisonment for life, whereas in latter it must have been committed in order to commit an offence punishable with imprisonment only.

(16) In the present case, there is evidence to this effect that these appellants had tried to commit robbery after the sunset and before sunrise by making house trespass of the complainant having taken precautions regarding their concealment from the complainant and the act committed by the accused persons would be covered under the definitions of lurking house- trespass by night and in the facts and circumstances, they would be liable for punishment u/s 457 IPC. But, since they have been held guilty of the offence punishable u/s 394 IPC, which is punishable with imprisonment for life, the trial Court has rightly held them guilty of offence punishable u/s 450 IPC also. There appears to be no illegality in convicting the appellants u/s 450 as well as 457 of the IPC and the second argument advanced by learned counsel for the appellants can also not be sustained.

(17) Lastly, learned counsel for the appellants argues that the appellants were aged about 24 and 30 years on the date of incident, therefore, the punishment awarded to them u/ss 394 & 450 appears to be

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -13-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

harsh. He submits that the punishment part should be considered by the Court.

(18) The offence is said to have taken place in the year 1988 and the conviction and sentence were awarded in the year 1989 and the appellants were on bail during trial and they are also on bail during the pendency of this appeal. Therefore, looking to the long time elapsed and further looking to the quantum of property in question, the prayer appears to be reasonable.

(19) After hearing learning counsel for the appellants and learned counsel for the State on this point, I deem it proper to award R.I. for 3 years with a fine of Rs.500/- under each section i.e., 450 & 394 IPC to each appellant to meet the ends of justice and to this extent, the said prayer is allowed.

(20) In the result, the appeal is partly allowed. The conviction of the appellants awarded under Sections 450, 394 & 457 of IPC are maintained. The sentences awarded to them under Section 457 is also maintained. However, the sentences awarded to them under Sections 450 & 394 of IPC are set aside. Instead of 5 – 5 years R.I. under these two sections, they are sentenced to undergo R.I. for 3 – 3 years and to pay a fine of Rs.500-500/-, in default of payment of fine to further

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -14-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश
	undergo R.I. for 6 - 6 months under each of these Sections. The above sentences awarded/modified by this Court shall run concurrently. It is stated that the appellants are on bail. They are required to surrender before the trial Court for undergoing the remaining sentences. A copy of this judgment be sent to the trial Court immediately for compliance. **Sd/-** **SUNIL KUMAR SINHA** **Judge**	

Rao/Shyam